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DECISION



21002 *Eaton*

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: R-202181

DATE: March 4, 1982

MATTER OF: Lundy Electronics and Systems, Inc.

DIGEST:

1. When record contains no probative evidence as to when protester knew or should have known basis of protest, doubt as to timeliness will be resolved in favor of protester, and GAO will consider issues raised.
2. GSA delegation of authority to procure automatic data processing equipment permits contracting agency to purchase up to maximum stated quantity in accord with applicable procurement policies and regulations, but confers no contractual rights upon supplier.
3. When contracting officer has compared availability and prices of automatic data processing equipment from five different contractors and has considered other factors before determining that exercise of option is in best interest of Government, regulation requiring market survey has been satisfied.

Lundy Electronics and Systems, Inc. protests regarding two aspects of a contract for remote terminals which are part of a Department of Defense communications network known as AUTODIN (automatic digital network). We deny the protest.

Background:

The General Services Administration awarded the contract, No. GS-00C-50167, to Astronautics Corporation of America in August 1975, following a competitive procurement. A fixed-price, requirements contract, it has a guaranteed minimum of 200 Tempest-tested remote terminals (defined as a line control unit and one or more peripherals, or supporting devices, all of which have been tested

by the Department of Defense to insure security in transmission of classified messages). The contract is a mandatory source of supply for virtually all Federal agencies when it meets their needs. Options, which were evaluated, permit renewal for up to 96 months. Since award, the Government and Astronautics have agreed to 51 contract modifications, the most recent extending performance through September 1982.

The Procurement Division, Fort Huachuca, Arizona, has administered the contract since May 1977, when GSA delegated successor contracting officer authority to the Army Communications System Agency, Fort Monmouth, New Jersey, and that agency redelegated the authority to Fort Huachuca. GSA indicates that when an agency has AUTODIN remote terminal requirements, it submits a purchase request either to GSA or directly to the contracting officer at Fort Huachuca, who determines whether the contract applies and, if so, issues a delivery order to Astronautics.

Lundy's Protest:

A. Scope of the Contract

Lundy's first basis of protest stems from a delivery order, No. DAFALB-81-F-3130, for purchase, installation, and maintenance of "SRT/OCRE equipment" for use at Bergstrom Air Force Base, Texas. (SRT/OCRE refers to standard remote terminal/optical character recognition equipment, which is used to convert messages to mediums such as magnetic tape, so that they may be transmitted electronically.) Lundy manufactures "stand alone" optical character recognition equipment, which it defines as equipment which interfaces directly with AUTODIN. The firm alleges that such equipment is outside the scope of the Astronautics contract, which Lundy contends is limited to equipment which is linked to the AUTODIN system through communications processors such as the Army's ANHE (automated multimedia exchange).

Lundy does not argue that the equipment should have been procured competitively. Rather, it believes that the Air Force should have obtained optical character recognition equipment for Bergstrom Air Force Base under a delegation of procurement authority issued by GSA in January 1977. This delegation permitted the Air Force to buy up to 37 "stand alone" units directly from Lundy; according to Lundy, 30 such units were purchased during a period when Astronautics

was not capable of delivering this type of equipment. Now, however, the record indicates that Astronautics can provide it (Lundy does not challenge this capability), and GSA and the Army argue that due to the mandatory nature of the Astronautics contract, the Air Force must obtain any additional units from that firm. Both GSA and the Army assert that the equipment is within the scope of the contract. Astronautics further argues that the equipment delivered to Bergstrom Air Force Base operates through a communications processor (though not an ANMF); the Army, however, has not confirmed this.

Lundy's protest on this basis is arguably untimely, since the delivery order was issued on January 28, 1981, but the protest was not filed until April 3, 1981. Our Bid Protest Procedures, 4 C.F.R. § 21.2 (1981), state that protests must be received by our Office within 10 days after the basis for them is known or should have been known, whichever is earlier. The Army asserts that Lundy should have known of the delivery order within 10 days after it was issued, but nevertheless requests our decision, since it anticipates a continuing series of protests which it believes may prevent it from utilizing the Astronautics contract.

There is nothing in the record to indicate when Lundy actually knew that the delivery order had been issued. We note that previously, absent probative evidence as to the date on which a protester knew or should have known of a basis of protest, our Office has resolved any doubt in favor of the protester. See Forest Scientific, Inc., B-192827, February 9, 1979, 79-1 CPD 188; compare Storage Technology Corporation, B-194549, May 9, 1980, 80-1 CPD 333, in which we found a protest untimely because it was clear that the contracting agency had advised the protester of its intent to issue a purchase order more than 10 days before the protest was filed. In this case, resolving doubt in favor of Lundy, we will consider the matter.

On the question of whether equipment ordered for Bergstrom Air Force Base is within the scope of the Astronautics contract, we note first that Part II, Sections F.3.2.2 and F.3.3.16, list optical scanning units among the peripheral devices which are to be provided by Astronautics. (Others include visual display units, printers, card readers and punches, magnetic tape units, and paper tape readers and punches.) Thus, at least in a generic sense, optical character recognition equipment clearly is covered by the Astronautics contract.

Lundy, as noted above, contends that the contract is confined to optical character recognition equipment which operates through communications processors. Section F.3.2.1 of the Astronautics contract states that the remote terminals shall provide "on-line communications" with an ANUE, an ASC (AUTODIN switching center), and with another remote terminal or data processing installation. These different methods of access to the system were discussed in a support plan for standard remote terminals prepared by Fort Huachuca in July 1978. The plan states that the terminals to be provided by Astronautics fall into three primary categories: (1) automatic message processing equipment remote terminals, (2) AUTODIN terminals; and (3) special systems. Those in the first category are connected to and depend upon communications processors; those in the second category, however, are described as operating directly into an AUTODIN switching center. The plan uses the phrase "stand alone" in connection with the second category of terminals. Thus, it appears that the Air Force reasonably could have concluded that the contract was intended to cover the type of equipment in question.

We need not conclusively resolve this question, however, because, as noted above, Lundy does not assert that the Air Force should have competed the requirement rather than going to Astronautics; rather, it argues that the Air Force should have purchased the equipment from it under the delegation of procurement authority. The answer to this assertion is simply that the delegation merely permitted--but did not require--the Air Force to purchase the maximum stated quantity in accord with applicable procurement policies and regulations. See Federal Procurement Regulations (FPR) §§ 1-4.1107 and 1-4.1109 (amended 46 Fed. Reg. 1197 (1981)). In our opinion, Lundy gained no contractual rights from the delegation of procurement authority. Lundy's protest on the issuance of the delivery order therefore is denied.

B. Exercise of Annual Option

Lundy's second broad basis of protest is that the contracting officer at Fort Huachuca failed to comply with Defense Acquisition Regulation (DAR) § 1-1501 (1976 ed.) in exercising the option to extend Astronautics' contract for an additional year. It appears that Lundy is referring to DAR § 1-1505(c), which states that before exercising an option, the contracting officer must determine that (1) funds are available; (2) the requirement covered by

the option fills an existing need; and (3) the exercise of the option is the most advantageous method of filling the Government's need, price and other factors considered. For automatic data processing equipment, these same requirements are listed in FPR § 1-4.1110.3(f). The DAR, however, lists examples of other factors to be considered in exercising any option and specifically states that, with regard to price, the contracting officer generally must make a determination on the basis of either a new solicitation or an informal investigation of the market which clearly indicates that a more advantageous offer cannot be obtained. See DAR §§ 1-1505(e) and (f).

We need not decide whether the FPR or the DAR applies to a procurement by the Army under a delegation of authority from GSA because, in our opinion, the contracting officer in this case complied with the more stringent regulation. For example, the record shows that the contracting officer considered the lead time required for development of and award under a new solicitation, as well as the availability and cost of maintenance of Astronautics-furnished equipment, both in the United States and worldwide. In addition, she prepared detailed charts supporting her determination; although these have not been released to Lundy, we have reviewed them. The contracting officer's findings may be summarized as follows:

- The guaranteed quantity of 200 remote terminals, backed by GSA's automatic data processing fund, has not yet been ordered;
- the goals of commonality and standardization set for the Secretaries of the Military Departments and the Directors of Defense Agencies in 1975, when the contract was awarded, would be adversely affected if AUTODIN remote terminals were obtained from another source or multiple sources; and
- there is no other known contractor whose equipment, in all required configurations, has been Tempest certified.

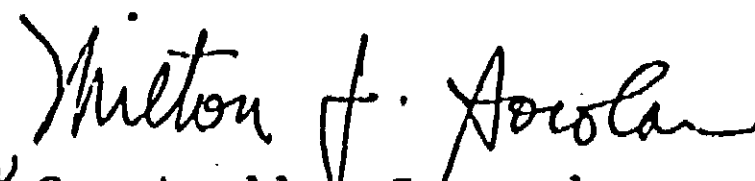
In our opinion, although the contracting officer did not address the impact on standardization of the 30 Lundy units already in place, her findings are otherwise reasonable. GSA, which under the Brooks Act, 40 U.S.C. § 759 (1976), has authority to coordinate and provide for the economic purchase, lease, and maintenance of automatic

data processing equipment, has a contractual commitment to pay Astronautics for the minimum of 200 remote terminals under its mandatory requirements contract. As we have previously stated, there is no question that requirements contracts are valid, under the theory that one party agrees to let another party fill its actual requirements for a particular item or service during a certain period, and the other party agrees to fill such requirements, so that these promises constitute valid consideration. The fact that the equipment in question now is available from more than one offeror is no reason for the Government to breach its mandatory requirements contract with Astronautics, and does not provide a reason to sustain Lundy's protest. See generally U.S. Financial Services, Inc., B-195945.4, B-198276, July 15, 1981, 81-2 CPD 32.

With regard to prices, the contracting officer compared those of five firms for 10 different remote terminal configurations plus optical character recognition equipment; Lundy can supply only the latter. She compared their estimated costs, including installation and maintenance based on current GSA schedules or, in Lundy's case, on a proposal dated March 10, 1981, before determining that exercise of Astronautics' option would be more advantageous than procurement from any other firm.

We therefore find that the contracting officer completed the market survey required by the DAR and conclude that her decision to extend the Astronautics contract was neither unreasonable nor violated procurement regulations.

Lundy's protest on this basis also is denied.

for 
Comptroller General
of the United States